PUBLIC BANK BHD.

v.

TRADIKON SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. D4-23-2468-87]
16 FEBRUARY 1989

CIVIL PROCEDURE: *For final judgment under O. 14 of the Rules of the High Court - Guarantee - Consideration - Whether past or void for uncertainty - Interest - Rate charged not clear.*

The plaintiff, (the bank), sued the 4th defendant on a guarantee given and obtained final judgment against him under O. 14 of the Rules of the High Court.

The plaintiff granted to the 1st defendant loan facilities comprising,:

(a) a fixed loan of RM200,000 at an interest rate of 13% per annum.

(b) an overdraft facility of RM250,000 at an interest rate of 13.5% per annum.

The 4th defendant was a guarantor. The 1st defendant defaulted. The bank obtained final judgment against the 4th defendant. The 4th defendant appealed against the decision of the Senior Assistant Registrar.

Held:

[1] The issue of past consideration is not applicable in the present case as the guarantee was a continuing guarantee.

[2] Since the guarantee was a continuing guarantee, the consideration was a good consideration.

[3] The rate of interest claimed by the bank was not clear i.e. whether the rate charged was lower or higher than the rate specified in the letter of offer.

[4] This was not a plain and obvious case for an O. 14 judgment and the plaintiffs had also obtained judgment in excess of what they were entitled to.

[Appeal allowed.]

For the plaintiff - Thomas; M/s. Azman Davidson & Co.
For the defendants - T.C. Ti; M/s. Steven Ti & Lee

JUDGMENT

Zakaria Yatim J:

This was an appeal by the fourth defendant against the decision of the Senior Assistant Registrar given on 19 July 1988 ordering that the plaintiff be at liberty to enter final judgment against the fourth defendant for a sum of RM192,979.78 together with interest at 3.75% above the bank's base lending rate of 8.5% per annum with yearly rests from 1 May 1987 till the date of full settlement and a sum of RM266,414.41 together with interest at 4.25% above the bank's base lending rate of 8.5% per annum with monthly rests from 1 May 1987 until date of full settlement.

In the statement of claim the plaintiff, a bank, stated that it granted to the first defendant loan facilities comprising (a) a fixed loan of RM200,000 at an interest rate of 13% per annum on yearly rests or such other rate as may from time to time be varied by the plaintiff in its absolute discretion; (b) an overdraft facility of RM250,000 at an interest rate of 13.5% per annum on monthly rests or such other rate as may from time to time be varied by the plaintiff in its absolute discretion. The rest of the defendants were guarantors. The second defendant by a letter of guarantee dated 14 August 1984 and the third, fourth, fifth and sixth defendants by another letter of guarantee dated 14 August 1984 jointly and severally undertook and agreed, on demand to pay the bank all and every part of the loans and all interests accrued therein. According to the statement of claim, the first defendant defaulted in the payment of the loans and the bank demanded from all the defendants the outstanding sums together with interest and costs. In respect of the fixed loan the bank's claim was for a sum of RM192,979.78 being the outstanding balance due and owing by the defendants to the bank. In respect of the overdraft facility the bank's claim was for a sum of RM266,414.42 being the outstanding sum due and owing by the defendants to the bank.

Mr. Ti, Counsel for the fourth defendant submitted that consideration was a past consideration. He also submitted that the consideration was void for uncertainty.

The bank wrote to the first defendant a letter of offer dated 16 March 1984 in respect of the two bank facilities. It is not clear when this letter of offer was accepted. The bank's affidavit in support of the O. 14 application did not exhibit the letter of offer. It was the bank's further affidavit affirmed on 19 March 1988 that the letter of offer was exhibited. The said affidavit did not mention any date of acceptance. The last paragraph of the letter of offer stated:

> Should the above terms and conditions be acceptable to you, kindly signify acceptance by signing and returning the duplicate of this letter. This offer shall remain valid for a period of 14 days from the date of this letter, after which it will be deemed to have lapsed.

The letter exhibited to the affidavit did not show that the first defendant had accepted the offer. The bank filed another affidavit to which was exhibited the same letter of offer with the signatures of the first defendant at the bottom. The letter of offer did not state the date when the first defendant signed the letter. Presumably the first defendant signed its acceptance on the letter of offer within fourteen days from the date of the letter. As the letter of offer was dated 16 March 1984, the fourteen days would expire on 29 March 1984. The first defendant must have signed the letter of offer on any day between 16 March and 29 March and not later.

The fourth defendant signed two letters of guarantee. The first letter of guarantee was signed on 3 April 1984. According to the bank's affidavit affirmed on 11 May 1988 when one of the directors of the first defendant resigned a new guarantee was executed by the remaining directors. The second letter of guarantee was signed on 14 August 1984. Both letters of guarantee were identical except that in the second letter of guarantee there were only four guarantors including the fourth defendant.

The question of past consideration does not apply in the present case. The guarantee was a continuing guarantee. The preamble of the letter of guarantee stated:

> In consideration of your opening or continuing an account with and making advances or otherwise giving credit or accommodation to Tradikon Sdn. Bhd. of 22-1 Jalan 1/114A off Jalan Kuchai Lama Kuala Lumpur (hereinafter called "the customer"), we Hussein b. Hj. Mohamed, Kok Lee Wah, Tang Wai Chow and Wong Kit Kian of c/o the above with and guarantee you as follows, that is to say:

Clause 4 of the letter of guarantee also stated:

> 4. This guarantee shall be a continuing guarantee to you to the extent of Malaysian Dollars Four hundred and fifty thousand only (RM450,000) for the purpose of securing not merely an equivalent amount but (subject always to the said limit of ...) the whole of the money or general balance in clause 1 hereof mentioned notwithstanding any such payments receipts or dividends as are hereinbefore mentioned with interest on the sum claimable from us at the rate of ... per RM100 per mensem from the date of our receiving demand for payment thereof from which date you may at your discretion refuse further credit to the customer and close his account.

See *Heng Cheng Swee v. Bangkok Bank Ltd.* [1976] 1 MLJ 267. Since the guarantee was a continuing guarantee, the consideration was a good consideration.

The next point raised by Mr. Ti was that the defendants' liability under the guarantee was RM450,000 but the order granted by the Senior Assistant Registrar against the fourth defendant was for RM459,394.20 with interest.

According to the O. 14 application against the fourth defendant, the claim in respect of the fixed loan as at 30 April 1987 was RM192,979.78 together with interest at 3.75% above the bank's base lending rate at 8.5% per annum from 1 May 1987 till date of full settlement, in respect of the overdraft facility as at 30 April 1987, RM266,414.42 together with interest at 4.25% above the bank's base lending rate of 8.5% per annum from 1 May 1987 till date of full settlement.

According to clause 1 of the letter of guarantee, the guarantors agreed to pay all money owing to the bank for the first defendant "including interest at such rate as may from time to time agreed between the customer and you ... " Under clause 4 of the letter of guarantee the guarantors agreed to pay the whole of the money or general balance in clause 1 "with interest claimable from us ... " No rate of interest was specified in the blank space in clause 4. It seems to me that under the guarantee letter the fourth defendant was liable to pay interest only at the rate agreed upon between the bank and the first defendant. According to the letter of offer the interest rate in respect of the fixed loan was at 2.75% per annum above the base lending rate, which on the date the letter of offer was written was 10.25% and in respect of the overdraft facility at 3.25% per annum above the same base lending rate. From the documentary evidence these are the only rates of interest agreed upon between the bank and the first defendant and under the letter of guarantee the fourth defendant was liable to pay interest at these agreed rates.

The statement of accounts in respect of the fixed loan which was exhibited to the bank's affidavit affirmed on 19 March 1988 showed that as at 30 April 1987 the amount owed was as claimed. According to the statement this amount included interest but there was no evidence to show whether the interest charged from 1984 to 30 April 1987 was at the same rate as specified in the letter of offer, or at a lesser rate or higher rate. In another affidavit affirmed on behalf of the bank on 12 September 1988, the deponent averred, "In respect of the overdraft facility, I verily state that the sum of RM226,414.42 claimed herein, RM250,000 represents principal and RM16,414.42 represents interest." It is not clear whether the bank charged the interest in the sum of RM16,414.42 at the rate specified in the letter of offer or at a lower rate or higher rate.

In my opinion this is not a plain and obvious case for an O. 14 judgment. Furthermore the plaintiff had obtained judgment in excess of the sum they were entitled to, that is they had obtained judgment with interest higher than 8% per annum from the date of judgment to the date of realisation.

In the circumstances I allowed the appeal with costs.

Also found at [1989] 1 CLJ 1111